Southville City Sdn Bhd (formerly known as Tristar Acres Sdn Bhd) v Nurhasyimah Hisamud-Din & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–24–01 OF 2019
NORDIN HASSAN J
14 MAY 2019

Civil Procedure — Judicial review — Application for — First respondent filed claim with Tribunal of Homebuyers Claims for liquidated and ascertained damages ('LAD') against applicant developer for late delivery of vacant possession — First respondent filed claim with Tribunal of Homebuyers Claims for liquidated and ascertained damages ('LAD') against applicant developer for late delivery of vacant possession — Whether contract entered by parties valid — Whether contract formed when deposit paid — Whether legal firm was applicant's agent and acted on behalf of applicant — Whether first respondent's acceptance of payment as full and final payment of LAD estopped first respondent from filing claim for LAD — Whether date of calculating LAD began from date of sale and purchase agreement or date of payment of booking fee — Whether second respondent's decision tainted with any error of law, irrationality, or unreasonableness

The applicant was the developer of a housing project whereas the first respondent was the purchaser of a unit of house in the said project. The first respondent had filed a claim with the Tribunal of Homebuyers Claims ('the second respondent') for liquidated and ascertained damages ('LAD') for late delivery of vacant possession by the applicant. The second respondent found in favour of the first respondent and awarded the sum of RM20,127.14 to the first respondent. Aggrieved by the decision, the applicant filed the present judicial review application. The grounds submitted by the applicant were: (a) the contract entered by both parties were invalid as when the deposit was collected on 24 September 2013 the applicant had no advertisement and sales permit and developer license as it was only obtained on 26 March 2014; (b) the contract was not formed on 24 September 2013 when the deposit of RM3,000 was paid to Messrs Khairin Nisa & Co; (c) Messrs Khairin Nisa & Co was not an agent of the applicant or acting for the applicant at the material time; (d) the first respondent had accepted the payment of LAD on 22 June 2018 vide letter from the applicant dated 18 June 2018 and the letter specifically stated that the payment shall be constituted as full and final payment of the LAD, as such, the first respondent was bound by the terms in the said letter; and (e) the date in calculating LAD began from the date of the sale and purchase agreement ('the SPA') and not the date the booking fee was paid.

Held, dismissing the applicant's judicial review application with costs of RM5,000:

(1) The contract between the parties existed upon the payment of the booking fee was valid as the consideration and object of the agreement were legal. The consideration was the payment of the booking fee and thereafter the payment of the purchase price and the object was the unit bought by the first respondent. The non-having of the advertisement and sales permit and developer license did not affect the validity of the contract although the applicant may commit an offence under the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations'). Further, it was trite law that a party cannot take advantage of its own wrong. Therefore, the applicant in the present case should not be allowed to rely on its failure to obtain the said permit and license under the Regulations to escape its responsibility under the contract (see paras 6 & 8–10).

(2) It was an established fact that booking fee for the unit had been paid as requested by the applicant's agent. Further, para 22 of the irrevocable offer to purchase ('the offer') signed by the first respondent mentioned about booking of the property which was the unit the first respondent intended to buy. The offer also contained the unit's number to be purchased and its price. Subsequently, both parties signed the SPA concerning the same property with the same price as in the offer. As such, the payment of RM3,000 was the booking fee for the unit purchased by the first respondent. In the circumstances, the contract between the applicant and first respondent was validly formed on the 24 September 2013 when the first respondent paid the booking fee (see paras 13–15 & 17).

(3) Based on the established facts, it was clear that Messrs Khairin Nisa & Co was actually acting for the applicant and when it accepted the booking fee, it was accepted on behalf of the applicant notwithstanding that the said money was handed over to the applicant on a later date. In this regard, the applicant should not be allowed to avoid the legal requirement to pay the LAD from the date of booking fee by having Messrs Khairin Nisa & Co to collect the deposit under the pretext as a 'stakeholder' and acting for the first respondent (see paras 20–21).

(4) On the issue that the first respondent had accepted the payment of LAD from the applicant as full and final settlement, it did not estopped the first respondent to exercise her contractual entitlement for the LAD under the SPA. Further, the contract entered by the parties was a special contract prescribed and regulated by statute. The terms of sale and purchase under Schedule 'H' was not capable by being modified or varied. There was nothing to show that the first respondent had agreed to forego her contractual entitlement of the LAD. The applicant had also not shown

the detail calculation in arriving to the amount stated in the letter dated 18 June 2018. As such, the first respondent was at liberty to file her claim for the LAD irrespective of the LAD accepted earlier from the applicant (see paras 22–23 & 26–27).

(5) Although cl 25 of the SPA stipulated that the time of delivery of vacant possession shall be within 48 months from the date of the SPA and cl 27 provided the completion of the common facilities shall be completed within 48 months from the date of the SPA and it was a statutory contract pursuant to Schedule 'H' of the Housing Department (Control and Licensing) Regulations 2002, it had been decided by the Supreme Court in *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597 ('*Faber Union*'s case') that the calculation for LAD began from the date of payment of the booking fee. The *Faber Union*'s case was decided after the new Regulations and Schedule 'H' came into force on 1 April 1989. The court was bound to follow the said decision on the principle of stare decisis. Therefore, the calculation made by the second respondent on the basis that the commencement date for calculation of LAD from the date the booking fee was paid was correct. In totality, the second respondent's decision was not tainted with any error of law, irrationality, or unreasonableness (see paras 30, 33 & 37–38).

[Bahasa Malaysia summary

Pemohon adalah pemaju projek perumahan manakala responden pertama adalah pembeli unit rumah dalam projek tersebut. Responden pertama telah memfailkan tuntutan kepada Tribunal Tuntutan Pembeli Rumah ('responden kedua') untuk ganti rugi tertentu dan ditetapkan ('LAD') kerana penyerahan lewat hak milik oleh pemohon. Responden kedua membuat keputusan yang memihak kepada responden pertama dan memberikan sejumlah RM20,127.14 kepada responden pertama. Terkilan dengan keputusan tersebut, pemohon memfailkan permohonan semasa untuk semakan kehakiman. Alasan-alasan yang dikemukakan oleh pemohon adalah: (a) kontrak yang dimeterai oleh kedua-dua pihak tidak sah kerana ketika deposit diterima pada 24 September 2013, pemohon tidak mempunyai permit iklan dan penjualan dan lesen pemaju kerana ianya hanya diperoleh pada 26 Mac 2014; (b) kontrak tidak dibentuk pada 24 September 2013 apabila deposit berjumlah RM3,000 dibayar kepada Tetuan Khairin Nisa & Co; (c) Tetuan Khairin Nisa & Co bukan ejen pemohon atau bertindak untuk pemohon pada waktu yang material; (d) responden pertama telah menerima pembayaran LAD pada 22 Jun 2018 melalui surat dari pemohon bertarikh 18 Jun 2018 dan surat tersebut secara khusus menyatakan bahawa pembayaran tersebut harus dianggap sebagai pembayaran penuh dan terakhir LAD, dengan itu, responden pertama terikat dengan terma-terma di dalam surat tersebut; dan (e) tarikh dalam mengira LAD bermula dari tarikh perjanjian jual beli ('SPA') dan bukan tarikh bayaran tempahan dibuat.

Diputuskan, menolak permohonan semakan kehakiman oleh pemohon dengan kos RM5,000:

(1) Kontrak antara pihak-pihak yang wujud setelah pembayaran yuran tempahan adalah sah kerana pertimbangan dan objek perjanjian itu adalah sah. Pertimbangannya adalah pembayaran bayaran tempahan dan selepas itu pembayaran harga pembelian dan objeknya adalah unit yang dibeli oleh responden pertama. Ketiadaan permit iklan dan penjualan dan lesen pemaju tidak mempengaruhi keesahan kontrak walaupun pemohon mungkin telah melakukan kesalahan di bawah Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Perlesenan) 1989 ('Peraturan-Peraturan tersebut'). Tambahan lagi, adalah undang-undang yang mantap bahawa suatu pihak tidak boleh mengambil manfaat dari kesalahannya sendiri. Oleh itu, pemohon dalam kes ini tidak boleh diizinkan untuk bergantung ke atas kegagalannya untuk mendapatkan permit dan lesen tersebut di bawah Peraturan-Peraturan tersebut untuk melepaskan tanggungjawabnya di bawah kontrak (lihat perenggan 6 & 8–10).

(2) Sudah menjadi fakta yang dibuktikan bahawa bayaran tempahan untuk unit tersebut telah dibayar seperti yang diminta oleh ejen pemohon. Selanjutnya, perenggan 22 dari tawaran pembelian yang tidak boleh ditarik balik ('tawaran tersebut') yang ditandatangani oleh responden pertama menyatakan tentang tempahan hartanah yang merupakan unit yang hendak dibeli oleh responden pertama. Tawaran tersebut juga mengandungi nombor unit yang akan dibeli dan harganya. Seterusnya, kedua-dua pihak menandatangani SPA mengenai hartanah yang sama dengan harga yang sama seperti dalam tawaran tersebut. Oleh yang demikian, pembayaran sebanyak RM3,000 adalah bayaran tempahan untuk unit yang dibeli oleh responden pertama. Dalam keadaan ini, kontrak antara pemohon dan responden pertama secara sah dibentuk pada 24 September 2013 apabila responden pertama membayar bayaran tempahan (lihat perenggan 13–15 & 17).

(3) Berdasarkan fakta yang telah dibuktikan, jelas bahawa Tetuan Khairin Nisa & Co sebenarnya bertindak untuk pemohon dan ketika menerima bayaran tempahan, ia diterima bagi pihak pemohon walaupun wang tersebut telah diserahkan kepada pemohon di kemudian hari. Sehubungan itu, pemohon tidak boleh dibenarkan untuk mengelak syarat undang-undang untuk membayar LAD dari tarikh bayaran tempahan dengan meminta Tetuan Khairin Nisa & Co untuk menerima deposit dibawah dalihan sebagai 'pihak berkepentingan' dan bertindak bagi pihak responden pertama (lihat perenggan 20–21).

(4) Mengenai isu bahawa responden pertama telah menerima pembayaran LAD dari pemohon sebagai penyelesaian penuh dan terakhir, ia tidak menghalangi responden pertama untuk menggunakan hak kontraknya

untuk menuntut LAD di bawah SPA. Selanjutnya, kontrak yang dimeterai oleh pihak-pihak adalah kontrak istimewa yang ditentukan dan diatur oleh undang-undang. Terma-terma jual beli mengikut Jadual 'H' tidak boleh dimodifikasi atau diubah. Tidak ada bukti yang menunjukkan bahawa responden pertama telah bersetuju untuk melepaskan haknya yang termaktub di dalam kontrak untuk menuntut LAD. Pemohon juga tidak menunjukkan pengiraan terperinci untuk mencapai jumlah yang dinyatakan dalam surat bertarikh 18 Jun 2018. Oleh itu, responden pertama bebas untuk mengemukakan tuntutannya untuk LAD tanpa mengira LAD yang telah diterimanya lebih awal daripada pemohon (lihat perenggan 22–23 & 26–27).

(5) Walaupun klausa 25 SPA menetapkan bahawa waktu penyerahan hak milik kosong adalah dalam tempoh 48 bulan dari tarikh SPA dan klausa 27 menyatakan penyelesaian kemudahan bersama harus diselesaikan dalam tempoh 48 bulan dari tarikh SPA dan ianya adalah kontrak berkanun menurut Jadual 'H' Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 2002, ia telah diputuskan oleh Mahkamah Agung dalam *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597 ('kes *Faber Union*') bahawa pengiraan untuk LAD bermula dari tarikh pembayaran bayaran tempahan. Kes *Faber Union* diputuskan setelah Peraturan-Peraturan tersebut dan Jadual 'H' yang baharu berkuatkuasa pada 1 April 1989. Mahkamah terikat untuk mengikuti keputusan tersebut berdasarkan prinsip stare decisis. Oleh itu, pengiraan yang dibuat oleh responden kedua berdasarkan tarikh permulaan pengiraan LAD dari tarikh bayaran tempahan dibuat adalah betul. Secara keseluruhan, keputusan responden kedua tidak dicemari oleh kekhilafan undang-undang, tidak rasional, atau tidak masuk akal (lihat perenggan 30, 33 & 37–38).]

Cases referred to

Akira Sales Service (M) Sdn Bhd v Nadiah Lee bt Abdullah and another appeal [2018] 2 MLJ 537, FC (refd)

Faber Union Sdn Bhd v Chew Nyat Shong & Anor [1995] 2 MLJ 597, SC (folld)

Faber Union Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan dan Kerajaan Tempatan & Ors [2011] MLJU 732; [2011] 7 CLJ 37, HC (refd)

Hedgeford Sdn Bhd v Sri Ganatha all Sivanathan & Ors [2018] MLJU 1424, HC (refd)

Kin Nam Development Sdn Bhd v Khau Daw Yau [1984] 1 MLJ 256; [1984] 1 CLJ 347, FC (refd)

Leap Modulation Sdn Bhd v Pop Construction Sdn Bhd [2018] MLJU 773, CA (refd)

Lim Eh Fah & Ors v Seri Maju Padu [2002] 7 MLJ 262, HC (refd)

Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd & Another Appeal

[2013] MLJU 1646; [2013] 7 CLJ 713, CA (refd)
Pentadbir Tanah Daerah Petaling v Swee Lim Sdn Bhd [1999] 3 MLJ 489, CA (refd)
Periasamy s/o Sinnappan & Anor v Public Prosecutor [1996] 2 MLJ 557, CA (refd)
SEA Housing Corp Sdn Bhd v Lee Poh Chao [1982] 2 MLJ 31; [1982] CLJ Rep 305, FC (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966
Housing Development (Control and Licensing) Regulations 1989 regs 3(6), 5(4), Schedule H
Housing Development (Control and Licensing) Regulations 1982 (repealed by Housing Development (Control and Licensing) Regulations 1989) reg 12(1), Schedule E

Marcus Tan (Eunice Kwong with him) (Ricky Tan & Co) for the applicant.
Tay Shieh Chin (Yeoh Tze Hwa with her) (Ismail Sabri Wee & Wong) for the first respondent.
(Tribunal of Homebuyers Claims, Ministry of Housing and Local Government) for the second respondent.

Nordin Hassan J:

INTRODUCTION

[1] This is the applicant's judicial review application against the decision of the Tribunal of Homebuyers Claims ('the tribunal') dated 21 December 2018 which is in favour of the first respondent.

THE BRIEF FACTS

[2] The relevant facts in this application are as following:

(a) the applicant is a company with its registered address at Penthouse Suite 1, Wisma Mah Sing, No 163, Jalan Sungai Besi, Kuala Lumpur and the developer of a condominium known as 'Savanna Executive Suites', Southville City located at Geran No 312323, Lot No 1125, Mukim Dengkil, Daerah Sepang, Selangor ('the project');

(b) the first respondent was invited by the applicant's property agent to the show room of the project and was informed by the agent about the incentive scheme offered by the applicant for the purchaser of the project;

(c) the said incentive scheme as handed out to potential purchasers are as follows:

Incentive Scheme for Executive Suites:

– Promotional Rebate of 5% from the purchase price;

– Legal fee on Sale and Purchase Agreement (SPA) including disbursement fee is borne by developer;

– Legal fee on Loan Agreement is borne by developer excluding disbursement fee & stamp duty.

Terms & Conditions:

(i) To engage the developer's appointed panel of solicitors only for the preparation agreements;

(ii) To accept the Letter of Offer from the developer's appointed panel of end-financiers only for the purchase of the above mentioned property.

(d) on 24 September 2013, the first respondent who has decided to purchase the property paid RM3,000 which according to the first respondent as the booking fee to a designated lawyer from Messrs Khairin Nisa & Co;

(e) the first respondent was then asked to sign an irrevocable offer to purchase addressed to Messrs Khairin Nisa & Co for the purchase of unit No A2–13–03 of the project;

(f) the particulars in the irrevocable offer to purchase are, inter alia, the following:

(i) indicative price is RM330,000;

(ii) stakeholder sum of RM3,000; and

(iii) appointment of Messrs Khairin Nisa & Co as stakeholder for the purchase of the property.

(g) on 26 March 2014, the applicant obtained the Housing Developer's Licence and Advertisement and Sales Permit pursuant to regs 3(6) and 5(4) of the Housing Development (Control and Licensing) Regulations 1989 ('Regulations 1989');

(h) on 27 March 2014, the applicant and the first respondent signed the sale and purchase agreement (S&P agreement) for the first respondent to purchase unit No A2–13–03 with the purchase price of RM330,000;

(i) pursuant to cl 25(1) of the S&P agreement, the time for delivery of vacant possession is within 48 months from the date of S&P agreement and failing which the applicant is to pay LAD in accordance with cl 25(2) which is calculated from day to day at the rate of 10%pa of the purchase price from the expiry date of the delivery of vacant possession of the unit;

(j) thereafter, on 29 March 2018, upon completion of the project, the applicant issued a notice of delivery of vacant possession of the said unit to the first respondent;

(k) next, on 5 December 2018, the first respondent filed her claim with the second respondent for LAD for the late delivery of the vacant possession by the applicant; and

(l) having heard both parties, on 21 December 2018, the second respondent allowed the first respondent's claim and awarded the sum of RM20,127.14 which is RM16,772.62 for the late delivery of the unit and RM3,354.52 for the common facilities.

THE GROUNDS FOR THE JUDICIAL REVIEW APPLICATION

[3] The applicant's grounds for the judicial review application are as follows:

(a) the contract entered by both parties are invalid as when the deposit was collected on 24 September 2013 the applicant has no advertisement and sales permit and developer licence as it was only obtained 26 March 2014;

(b) the contract was not formed on 24 September 2013 when the deposit was paid;

(c) Messrs Khairin Nisa & Co was not the agent of the applicant or acting for the applicant at the material time;

(d) the first respondent has accepted the payment for LAD on 22 June 2018 vide letter from the applicant dated 18 June 2018 and the letter specifically states that the payment shall be constituted as full and final settlement of the LAD. Hence the first respondent is bound by the terms in the said letter; and

(e) the date in calculating the LAD begins from the date of the S&P agreement and not the date the booking fee was paid.

FINDINGS OF THIS COURT

[4] The principle of law with regard to judicial review application is well settled that the court may review on grounds of illegality, irrationality or procedure impropriety. The review not only on the decision making process but also its merits (see *Akira Sales Service (M) Sdn Bhd v Nadiah Lee bt Abdullah and another appeal* [2018] 2 MLJ 537).

[5] In the present case, the first issue to be determined is with regard to the validity of the contract entered by parties. It is the applicant contention that the contract is invalid as the payment of deposit was made before the applicant

obtained the advertisement and sales permit and developer licence under regs 3(6) and 5(4) of Housing Development (Control and Licensing) Regulations 1989.

[6] On this issue, the contract between the parties existed upon the payment of the booking fee is valid as the consideration and object of the agreement are legal. The consideration is the payment of the booking fee and thereafter the payment of the purchase price and the object is the unit bought by the first respondent.

[7] In this regard, reference to the Federal Court case of *Kin Nam Development Sdn Bhd v Khau Daw Yan* [1984] 1 MLJ 256; [1984] 1 CLJ 347, is instructive which held that the Rules does not affect the validity of a contract. Salleh Abbas CJ at p 186 has this to say:

> In any case there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses, and neither do they come within any of the paragraphs of s 24 quoted above, *although the appellant may well be guilty of an offence under r 17 for contravening r 11(1) of the Housing Developers (Conrol & Licensing) Rules 1970*. In other words, *these Rules do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers*. (Emphasis added.)

[8] Likewise in the present case, the non having of the advertisement and sales permit and developer licence does not affect the validity of the contract although the applicant may commit an offence under the Regulations.

[9] Further, it is also trite law that a party cannot take advantage of its own wrong. As pointed out in the Court of Appeal case of *Pentadbir Tanah Daerah Petaling v Swee Lim Sdn Bhd* [1999] 3 MLJ 489, in the following words:

> ... there is a principle of great antiquity that the *litigant ought not to benefit from its own wrong*. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulate as follows: *a party ought not to be permitted to take advantage if his own breach*. See *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v Societe Des Ateliers Et Chantiers De France* [1919] AC 1.
>
> But as I have said, the principle is of universal application. In the ... (Emphasis added.)

[10] Hence, the applicant in the present case should not be allowed to rely on its failure to obtained the said permit and licence under the Regulations to escape its responsibility under the contract.

[11] Further, the applicant in alternative submitted that no contract was formed on 24 September 2013 when the first respondent paid the booking fee as the applicant has not obtained the said permit and license from the authority.

[12] The applicant also relied on cl 1.2 of the irrevocable offer to purchase which states:

> 1.2 The Developer has informed me/us that the said Development wherein the Property is part of, is not yet open for sale and therefore the Developer is not prepared to collect any payment towards me/our intended purchase of the Property.

[13] On this issue, despite the abovestated provision in the irrevocable offer to purchase, it is an established fact that booking fee for the unit has been paid as requested by the applicant's agent from Messrs Khairin Nisa & Co which will be elaborated further in this judgment.

[14] Furthermore, in the irrevocable offer to purchase, at para 22, it mentioned about booking of the property which is the unit the first respondent intended to buy.

Paragraph 22 states:

> 22. This letter constitutes the whole agreement between me/us, and the Stakeholder with regard to the *booking of the Property* and the Stakeholder Sum and shall supercede all prior communications or understandings, indulcements or conditions, expressed or implied, oral or written.

[15] The irrevocable offer to purchase also contained the unit's number to be purchased and its price. Subsequently, both parties signed the S&P agreement concerning the same property with the same price as in the irrevocable offer to purchase. As such, the payment of RM3,000 was the booking fee for the unit purchased by the first respondent.

[16] In this regard, reference to the case of *Lim Eh Fah & Ors v Seri Maju Padu* [2002] 7 MLJ 262, is relevant where it states that a contract exist the date when the deposit is paid. The judge said this:

> One must bear in mind that the date of 17 July 1992 ie, *the deposit payment date, was the date when the contract was struck, and the very date the respondent assumed responsibility to fulfil its parts of the bargain. If the date of signing of the S&P agreement were to be taken as the relevant date, when time started to run for the delivery of the vacant possession, the respondent could willy-nilly pick any dates it favoured to execute the S&P agreement, which could certainly prejudice the interest of the purchaser*.

[17] In the circumstances, I find, the contract between the applicant and first

respondent was validly formed on the 24 September 2013 when the first respondent paid the booking fee.

[18] The next pertinent issue for determination here is whether Messrs Khairin Nisa & Co was acting for or agent of the applicant in the said project including the transaction involving the first respondent.

[19] In relation to this, the following established facts in relevant:

(a) the first respondent paid the booking fee of RM3,000 to a designated lawyer from Messrs Khairin Nisa & Co;

(b) the first respondent then was asked by the lawyer to sign the irrevocable offer to purchase which has the standard clause to appoint Messrs Khairin Nisa & Co as the stakeholder and to represent the house buyer to make the offer to purchase the unit;

(c) the first respondent did not personally appoint Messrs Khairin Nisa & Co to represent her before the payment of the booking fee or thereafter;

(d) Messrs Khairin Nisa & Co handled the sale and purchase and prepared the S&P agreement for purchasers and not only for the first respondent; and

(e) the S&P agreement was prepared by the developer's appointed panel of solicitors which is Messrs Khairin Nisa & Co as stated in the terms and conditions of the incentive scheme which is as follows:

> Terms & Conditions:
>
> i) To engage the developer's appointed panel of solicitors only for the preparation agreements;
>
> ii) To accept the Letter of Offer from the developer's appointed panel of end-financiers only for the purchase of the above mentioned property.

[20] Based on the established facts, it is clear that Messrs Khairin Nisa & Co was actually acting for the applicant and when it accepted the booking fee, it was accepted on behalf of the applicant notwithstanding that the said money was handed over to the applicant on a later date.

[21] In this regard, the applicant should not be allowed to avoid the legal requirement to pay the LAD from the date of booking fee by having Messrs Khairin Nisa & Co to collect the deposit under the pretext as a 'stakeholder' and acting for the first respondent.

[22] On the issue that the first respondent has accepted the payment of LAD on 22 June 2018 by letter dated 18 August 2018 from the applicant as full and

final settlement, it does not estopped the first respondent to exercise her contractual entitlement for the LAD under the S&P agreement.

[23] Furthermore, the contract entered by parties is a special contract prescribed and regulated by statute. The terms of sale and purchase under Schedule 'H' is not capable by being modified or varied.

[24] In the case of *SEA Housing Corp Sdn Bhd v Lee Poh Chao* [1982] 2 MLJ 31; [1982] CLJ Rep 305, the Federal Court held as follows:

> only terms and conditions designated to comply with the requirements of the rules that may be inserted in a contract of sale of land that is governed by the Act and rules, and that on the contrary and conditions which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted.

[25] Further, in the case of *Hedgeford Sdn Bhd v Sri Ganatha all Sivanathan & Ors* [2018] MLJU 1424, the High Court states as follows:

> (21) In *Sentul Raya Sdn Bhd v Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618 CA paragraph (8), Gopal Sri Ram JCA dealt with the same statutory provision and spoke of the inviolable position of the SPA in the following terms:
>
> > (8) ... the contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the schedule form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of the purchaser may not be included in the statutory form of contract ...

The judge then said this:

> (125) But as I said, this is no ordinary contract. Instead, it is a statutory contract. And based on the principles that are to be gleaned and derived from the Oxbridge case and GJH case, *it is clear that for a plea under Section 64 of the Contracts Act 1950 to be entertained, there must be convincing evidence that the purchasers had truly and indisputably agreed to forego their contractual entitlement of LAD under clause 27 SPA*. (Emphasis added.)

[26] Reverting to the present case, there is nothing to show that the first respondent has agreed to forego her contractual entitlement of the LAD. The applicant has also not shown the detail calculation in arriving to the amount stated in the letter dated 18 June 2018.

[27] As such, the first respondent is at liberty to file her claim for the LAD irrespective of the LAD accepted earlier from the applicant.

[28] Next, on the commencement date for the calculation of the LAD, the Supreme Court in *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597, has decided that the commencement date for calculation of LAD starts from the date of the booking fee.

[29] This decision was followed by many other cases and one of which is the case of *Lim Eh Fah* where the judge, as alluded to earlier said that if the date of calculation starts from the date of the S&P, the development could arbitrarily choose any date favourable to the developer which will prejudice the housebuyers. This is against the intention of Parliament in enacting the Housing Development (Control and Licensing) Act 1966, which is to protect the interest of house buyers as can be seen in the preamble which is as follows:

> An Act to provide for the control and licensing of the business of housing development in Peninsular Malaysia, *the protection of the interest of purchasers* and for matters connected therewith.

[30] Although cl 25 of the S&P agreement stipulates that the time of delivery of vacant possession shall be within 48 months from the date of the S&P agreement and cl 27 provides the completion of the common facilities shall be completed within 48 months from the date of the S&P agreement and it is a statutory contract pursuant to Schedule 'H' of the Housing Department (Control and Licensing) Regulations 2002, it has been decided by the Supreme Court in *Faber Union*'s case that the calculation for LAD begins from the date of payment of the booking fee. The *Faber Union*'s case was decided after the new Regulations and Schedule 'H' came into force on 1 April 1989.

[31] Even if in the *Faber Union*'s case the Housing Development (Control and Licensing) Regulations 1982 was applicable, the contract entered by parties then was also a statutory contract pursuant to reg 12(1) of the Housing Development (Control and Licensing) Regulations 1982 which requires every contract for sale to be in form prescribed in Schedule E.

Regulation 12(1) provides:

> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule E.
>
> (2) No amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with the prior approval in writing of the Controller.

[32] The decision in *Faber Union*'s case was also followed in the Court of Appeal case of *Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd & Another Appeal* [2013] MLJU 1646; [2013] 7 CLJ 713, where it states the

following:

> [40] *Our view on the calculation of the 30 month period is premised on the then Supreme Court judgment in Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 3 CLJ 797; [1995] 2 MLJ 597 where the facts are these. The date of agreement was 27 June 1984 while the deposit was paid on 17 February 1984. The agreement provided for a 36 month delivery period of vacant possession from the date of the agreement and the issue to be determined was when the 36 month period starts to run. The Supreme Court relied on an earlier case of *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170; [1988]1 CLJ 768; [1988] 1 CLJ (Rep) 125 where the factual matrix was the same. Despite what is stated in the agreement, the Supreme Court held that for the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time starts to run is the date on which the purchaser paid the booking been and not the date of the sale and purchase agreement. This is what Salleh Abas LP said in *Hoo See Sen*:
>
> > The appellants purchased a two storey link house which was to be constructed by the second respondent for $145,000. For this purpose, the appellants and the second respondent entered into a sale and purchase agreement on 18 August 1982 by paying a booking fee of $1,000 subject to various payments including progress payments. According to clause 18 of the sale and purchase agreement, which as only signed on 18 March 1983, the building was to be so constructed that the second respondent had to give vacant possession within 24 months of the date of agreement, ie 24 months from the date of paynment of pament of booking fees (18 August 1982). This means that by 17 August 1984, vacant possession should have been handed over to the appellant ...
>
> The above principle was applied in the case of *Lim Eh Fah & Ors v Seri Maju Padu* [2002]4 CLJ 37 and this is what Suriyadi Halim Omar J (as he then was) said:
>
> > Despite the submission that the appellant could only commence paying pursuant to cl 4(1) of the S&P agreement, only after having received financial backing from the fifth appellant (the bank) and a deed of assignment having been executed, hence the assertion that time began to run on 12 June 1993, I found that argument unacceptable. Apart from the above case of Faber Union Sdn Bhd being crystal clear, in the event of the appellant failing to adhere to the schedule of payment, there was nothing to stop the respondent from imposing interest on the late payments. This right is sufficiently provided for under cl 8 of the S&P agreement. Any failure on the part of the appellant, if any, to comply with cl 4, did not extinguish the responsibility of the respondent to fulfil the contract within the stipulated time. One must bear in mind that the date of 17 July 1992 ie the deposit payment date, was the date when the contract was struck, and the very date the respondent assumed responsibility to fulfil its part of the bargain. If the date of the signing of the S&P agreement were to be taken as the relevant date, when time started to rum for the delivery of the vacant possession, the respondent could willy-nilly pick any dates it favoured to execute the S&P agreement, which dould certainly prejudice the interest of the purchaser.
>
> The Court of Appeal in *Foong Seong Equipment Sdn Bhd v Keris Properties (PK) Sdn Bhd* [2009] 1 LNS 442 also adopted what was said by the Supreme Courts and this

is what they said:

> [30] As developer, the plaintiff is required to diligently proceed to complete the development project within the time specified in the SPAs, because upon the execution thereof, time effectively started to run against the developer: *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170 SC; *Faber Union Sdn Bhd v Chew Nyat Shang & Anor* [1995] 3 CLJ 797 SC; and *Lim Eh Fah & Ors v Seri Maju Padu* [2002] 4 CLJ 37 HC. (Emphasis added.)

[33] In this regard, I have no reason to depart from this superior courts' decision and bound to follow the said decision on the principle of stare decisis.

[34] In the Court of Appeal case of *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557, it states:

> *We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of stare decisis*. We thrust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein. (Emphasis added.)

[35] Likewise in the Court of Appeal case of *Leap Modulation Sdn Bhd v Pop Construction Sdn Bhd* [2018] MLJU 773, where David Wong Dak Wah JCA (as he then was) said this:

> [29] There is no two ways about it here. *The concept of stare decisis is applicable to the case at hand as the factual matrix there in our view is the same as here and could not be distinguished in anyway. We are thus bound by it, irrespective what out view may be*.
>
> [31] *Finally, we reiterate that the importance of the doctrine of stare decisis must not be overlooked*. As Benjamin Cardozo in his treatise, The Natural of Judicial Process (New Haven and London: Yale University Press 1021) at page 9-50, says:
>
> > It will not do to decide the same questions one way between one set of litigants and the opposite way between another. 'If a group of cases involved the same point, the parties expect the same decision. It would be a gross injustice to decide altermate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look at the same judgment today of I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights'. *Adherence to precedent must then be the rule rather than an exception if litigants are to have faith in the evenhanded administration of justice in the Courts*.

[36] The issue of the statutory contract need to be followed strictly has also been raised in *Faber Union Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan dan Kerajaan Tempatan & Ors* [2011] MLJU 732;

[2011] 7 CLJ 37, which has been rejected by the court and relying on the Supreme Court case of *Faber Union* it was held as follows:

> [13] *The applicant contends that the tribunal erred in amending the commencement date of the SPA to the date of payment of the deposit.* The tribunal relied on the case of *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597; [1995] 3 CLJ 797 wherein the issue for determination by Supreme Court is whether, in ascertaining the date of delivery of vacant possession of a building to be constructed, time started to run from the date payment of the booking fee was made or from the date of the signing of the sale and purchase agreement. In that case the deposit was paid on 17 February 1984 and the agreement was signed on 27 June 1984. The Supreme Court held that for the purpose of ascertaining the date of delivery of vacant possession the relevant date when time starts to run is the date on which the purchaser paid the booking fee and not the date of the signing of the sale and purchase agreement. The decision of the Supreme Court was followed in *Lim Eh Fah & Ors v Seri Maju Padu* [2002] 4 CLJ 37. In that case the purchaser paid the deposit on 17 July 1992. The sale and purchase agreement was executed on 10 October 1992. Suriyadi Halim Omar J (as His Lordship then was) held that the respondent assumed the responsibility to fulfil its part of the bargain at the date the deposit was paid, ie, 17 July 1992, in effect being the date when the contract was struch, and not the date the deed of assignment was signed. Otherwise, the respondent could arbitrarily choose any date it favoured to execute the sale and purchase agreement which would certainly prejudice the purchaser. *Thus, I find that the tribunal has not erred in deciding that the relevant date for the purpose of calculating the amount of damages payable by the applicant is the date the respondents paid the deposits.* (Emphasis added.)

[37] In the present case, the calculation made by the tribunal on the basis that the commencement date for calculation of LAD from the date the booking fee was paid is correct based on the authorities cited aboved.

CONCLUSION

[38] Premised on the aforesaid reasons, the tribunal's decision dated 21 December 2018 is not tainted with any error of law, irrationality or unreasonableness.

[39] In the circumstances, the applicant's judicial review application is dismissed with costs of RM5,000.

Applicant's judicial review application dismissed with costs of RM5,000.

Reported by Dzulqarnain bin Ab Fatar